ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 31 1996

In the Matter of:

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Leased Commercial Access	)	CS Docket No. 96-60

To: The Commission

DOCKET FILE COPY ORIGINAL

JOINT REPLY COMMENTS

E! Entertainment Television, Inc. ("E!"), Television Food Network ("TVFN"), America's Health Network ("AHN"), NorthWest Cable News ("NWCN"), and The Providence Journal Company ("Journal")[1] (all commentors referred to hereinafter collectively as "Networks"), hereby submit their reply comments in the above-referenced proceeding. The comments in this proceeding overwhelmingly demonstrate that there are serious problems with the proposed "cost/market formula." Not only will the formula unfairly discriminate against non-leasing programmers, but it also has the potential of disrupting and damaging the vigor and diversity of cable television programming as a whole. Thus, a principal purpose of these Joint Reply Comments is to urge the Commission to give these undisputed problems its careful attention. Although the Networks' Joint Comments pointed out that leasing channels, even at extremely low rates, probably would not be a viable option for them, this Joint Reply

[1] The Providence Journal is participating in this proceeding as Managing General Partner of TVFN, majority owner of AHN and sole owner of NWCN.

No. of Copies rec'd 0+4
List ABCDE

adamantly opposes any suggestion that "incumbent" programmers (i.e., those currently carried by cable systems on a non-leased access basis) should be precluded from leasing channels in the future. For reasons set forth more fully below, this Joint Reply strongly supports recommendations in certain comments concerning terms and conditions of part-time channel leasing. Finally, the Reply advocates a reasonable transition period.

I. There is widespread recognition that the proposed formula has some serious problems.

Comments submitted by the cable television industry demonstrate that the proposed formula, in practical application, produces leased channel rates of zero and, in some cases, negative numbers.[2] These results are due, in large measure, to overestimation of advertising revenues and the failure to include significant intangible lost opportunity costs. It is clear from comments of supporters of the proposed formula that although they expect the proposal to reduce rates, they clearly did not anticipate that it would produce such absurd results.

In addition, comments from all parties acknowledged that available channel capacity on cable systems currently is limited. Under such conditions, a sudden torrent of leased access usage would result in displacement of non-leasing programming services currently being carried or seeking such carriage. Even the comments of some of the strongest supporters of lowering channel leasing rates recognize these

---

[2] See, e.g., Comments of Cox Communications, Inc., at 16; Comments of Buckeye Cablevision, Inc., Attachment A; and Joint Comments of Multimedia Cablevision, Inc. and Susquehanna Cable Co., Exhibits 1 and 2.

disadvantages. For example, a study submitted by ValueVision International, Inc., concedes, "There are a fair number of marginal channels with minimal ratings that will suffer distribution losses," and concludes that "the leased access phenomenon will significantly reduce the number of successful new advertiser supported networks under traditional affiliate associations, and only those few with the 'right economic structure' will thrive as channel lessees."[3] The Report itself recognizes that the "right economic structure" requires a second revenue stream to replace revenues normally obtained from affiliate fees. Typically, such additional revenues come from direct marketing efforts (informercials, shopping channels or 900 number services).

Proponents of the proposed changes may be unconcerned about the effect of such changes on other programmers and the public; however, the Commission cannot be complacent on this point. Clearly, there are ways to implement the statutory scheme without placing a very successful and diverse programming industry in jeopardy or denying viewers the continued opportunity to watch programming they enjoy. Alternatives, such as the NCTA's average implicit fee approach, have been presented that will make leased access available on fair and reasonable terms. This is all that the statute requires; Congress did not intend to establish subsidies or "give always" of free channel capacity for commercial use, affordable to every would-be

---

[3] Comments of Valuevision International, Inc., Attachment A: Media Group Research, Industry Report, "Commercial Leased Access to Change Cable Landscape" (April 5, 1996). In light of its steady growth in ratings in key demographic sectors, E!, which considers itself to be vulnerable to "bumping," takes issue with the report's conclusion that only "marginal" channels with "minimal ratings" will be adversely affected by the new policies. Similarly, more recently launched services such as TVFN, AHN and NWCN, which are building their audiences and ratings, have demonstrated long-term potential and cannot be characterized as "marginal."

programmer. Accordingly, in light of the apparent consensus as to what results will ensue, the Networks urge the Commission to consider carefully whether a major upheaval is really necessary.

II. Incumbent channel occupants should not be precluded from leasing channels.

In their Joint Comments, the Networks explained why leasing channels, even at nominal rates, does not appear to be an attractive option for them or other providers of high quality programming. Even if they were to consider channel leasing, the Networks pointed out that they would need sufficient time to convert their operations to a leased access mode. The Networks note with some concern suggestions that incumbent channel occupants actually should be precluded from leasing channels in the future.[4] In view of the comments' widespread acknowledgement that leased commercial access is likely to be dominated by limited types of programming, it is difficult to fathom why rules that are likely to reduce diversity even further should be adopted. Denying incumbent programmers that are displaced from cable channels the ability to lease channels would be blatantly discriminatory and might deprive these networks of the ability to reach an audience. There is no reason to preclude any programmer from leasing a channel merely because it is already on a cable system.[5]

---

[4] See, e.g., Comments of Center for Media Education, et al., at pp 13-15.

[5] As a network in which several major MSOs are investors, E!'s ability to lease channels on affiliated cable systems already is limited. (Section 76.970(a) of the Commission's rules provides leased access only for entities unaffiliated with the cable system operator in question.) There is no need to restrict E!'s ability to lease time on unaffiliated cable systems should it choose to do so in the future.

III. Reasonable terms and conditions should be established for part-time leased access programming.

The Networks wholeheartedly support comments suggesting reasonable terms and conditions for part-time leasing. While they are not opposed to making some capacity available for programmers who wish to lease channels part-time, the Networks are convinced that safeguards are necessary to prevent confusion and abuse. Comments have pointed out that introduction of poor quality or unattractive programming on a tier can have an adverse effect on programming occupying adjacent channels and that viewers tend to attribute poor or objectionable programming to the cable operator or to adjacent networks.[6] Such subscriber confusion is exacerbated when undesirable programming is put on the same channel with another service. Moreover, as E! knows from the experience related below, some part-time access programmers are not the least bit hesitant to claim an association with other non-leasing occupants on the channel, even when no relationship exists.

Because of lack of capacity, a cable system carrying E! placed a part-time leased access programmer on the same channel occupied by E!. It recently came to E!'s attention that in letters requesting leased access from other cable operators, the leased programmer was implying an association with E!, based solely on a channel sharing arrangement over which E! had no control. E! had to threaten legal action to stop this programmer from using E!'s name and reputation in its marketing campaign.

---

[6] See, e.g., Comments of the Time Warner Cable, at 31; and S. Besen and J. Murdoch, "The Impact of the FCC's Leased Access Proposal on Cable Television Program Services," (submitted as attachment to Joint Comments of Turner Broadcasting System, Inc. et al.)

As a result of E!'s experience and other practical problems raised in various comments, the Networks support the following policies for part-time channel leasing: (i) an increase in the minimum increment for part-time leasing from one-half hour to at least two hours; (ii) preferences for full-time over part-time leasing; (iii) retention of the "comparable time slot" policy; and (iv) preference for placement of leased access programming on channels designated exclusively for leased access (rather than carriage on a shared basis with full-time, non-leased programming).

IV. A reasonable period should be provided for transition to significantly different leased channel rates.

Proponents of reduced channel leasing rates have opposed adoption of transition measures on the grounds that the statute contemplates displacements as leased access use develops. Cable operators have shown that a certain amount of leasing has developed under the current, highest implicit fee formula, that displacements have occurred and that cable operators, displaced programmers and subscribers have weathered them. Proposals made in the FNPRM and some of the comments -- from free or extremely low-cost channel time to preferences or special set-asides for non-profit programmers -- will drastically change the ground rules for channel leasing, stimulating a sudden new demand for leased channels and giving certain channel users a definite preference over others. Without a reasonable transition mechanism, the extent, frequency and rapidity of displacements will escalate. Such upheaval may benefit a small number of would-be programmers, but only at the expense of the Networks and other non-leasing programming services that have demonstrated a long-term commitment to quality programming. In the interests of preserving the vitality of the existing programming industry and respecting the well-being of the viewing public, the Commission should allow sufficient time -- at least 3-5 years -- to usher in any changes in the existing regulatory scheme.

V. Conclusion

The comments submitted in this proceeding convincingly demonstrate that an alternative to the proposed "cost/market" formula is needed. A viable alternative as well as many helpful suggestions as to the terms and conditions of channel leasing have been recommended. The Networks urge the Commission to choose an approach that fulfills the statutory mandate for leased access without jeopardizing the existing programming industry or the cable viewing public.

Respectfully submitted,

E! ENTERTAINMENT TELEVISION, INC.
TELEVISION FOOD NETWORK
AMERICA'S HEALTH NETWORK
NORTHWEST CABLE NEWS
THE PROVIDENCE JOURNAL COMPANY

By: Donna C. Gregg

Donna C. Gregg
Todd D. Daubert

Their Attorneys

Wiley, Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006
202-429-7000

May 31, 1996